United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7225

To be argued by
A. SETH GREENWALD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WALTER D. CROMER and ALBERT GRAHAM, :

Plaintiffs-Appellants, :

-against- :

MRS. MAURICE T. MOORE, individually and as CHAIRMAN OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, et al., :

Defendants-Appellees. :

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BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Questions Presented

1. Did the amended complaint contain a sufficient statement of claim showing that the appellants are entitled to relief on the legal theory presented?

2. Were the appellants deprived of any due process rights by the cancellation of their registration solely for academic reasons?

(a) Does any manner of due process attach to a dismissal for academic failure?

Statement

This is an appeal by plaintiffs-appellants of the dismissal of their civil rights action, 42 U.S.C. § 1983, by the United States District Court for the Eastern District of New York on May 10, 1976 (A-4).* The complaint dismissed was an amended one alleging that plaintiffs were denied their procedural and substantive due process in the cancellation of their registrations at the Downstate Medical School in the summer of 1975.

Initially, the plaintiffs filed a complaint contending that they were racially discriminated against in certain procedures at the School (A-5). After defendants filed uncontroverted affidavits and depositions were taken of plaintiffs and several defendants, the plaintiffs abandoned any claim of racial discrimination, and moved to file an amended complaint (A-6) which spoke only of denial of procedural and substantive due process.

While the District Court had written an extensive memorandum in denying a continuation of any injunctive order and the motion to dismiss as to the original complaint, (A-2) no opinion was written on the motion

* Numbers in parenthesis refer to abbreviated appendix in the back of appellants' brief.

to dismiss the amended complaint.*

Facts

In the memorandum of November 5, 1975 (A-2), the District Court recited facts which remained uncontroverted and relevant to the dismissal of the amended complaint.

To quote in relevant portion:

> "Plaintiff Walter Cromer entered DMC [Downstate Medical School] in September 1973. He failed the three courses he took in his first semester, at which point he was placed in the decelerated program . . ."
>
> "In the decelerated program, Cromer failed Histology, received an incomplete in Biochemistry, and passed Environmental Medicine. Because of personal problems Cromer was allowed to repeat all the courses of the first year in the academic year 1974-75. He failed to take the final examinations in Gross Anatomy, Biochemistry, Histology and Neuroscience and thus received incomplete in all those courses. In June of 1975, the Promotions Committee gave Cromer an opportunity to make up his incompletes. The first make-up exam was in Neuroscience, which he failed. Thereupon Cromer's registration was cancelled."
>
> "Plaintiff Albert Graham entered DMC in 1972. In his first semester he

* The District Court had already commented on the reluctance to interfere with purely academic decisions. Memorandum, p. 9.

> failed at least two courses and was therefore placed in the decelerated program. He successfully passed Histology and Biochemistry that semester, and in the academic year 1973-74 passed Gross Anatomy, had an incomplete in Neuroscience, failed Physiology, and in June failed the make-up exam in Neuroscience after his request for a 2 day postponement was denied. In the summer he was re-examined in Neuroscience and again failed. Although in August 1974 his registration was cancelled, after appeal to the Dean he was reinstated upon certain conditions. He was given the opportunity to make up Neuroscience and Physiology. He failed both and in June 1975, his registration was cancelled."
> (A-2; pp. 1, 2, 3).*

In moving to dismiss, the defendants presented an affidavit in support and it was not controverted (pp. 4-5; Affidavit in Support of A. Seth Greenwald, April 19, 1976):

> "Thus plaintiff Cromer did appeal his cancellation of registration by the Promotions Committee (the members of which are not defendants) and met with defendants Greene and Laster on July 25 and 31, 1975. Mr. Cromer presented his case and was given the rationale for cancellation which was upheld. He was informed of his right to appeal to the President, defendant Plimpton. See original complaint, paragraph '33.'"

* Summary of academic record of plaintiffs annexed to brief.

"Similarly plaintiff Graham followed this procedure in the summer of 1974 when he was allowed to continue in school for another year by the Dean."

Despite the numerous factual affidavits presented by appellees, the plaintiffs-appellants have never made an affidavit in the court below in any manner alleging any errors in their academic records.

The amended complaint simply contended, without stating that plaintiffs had failed after two (Cromer) and three (Graham) years at DMC to complete the first year of their medical education, that the Promotions Committee acted "arbitrarily" because it acted informally, and had "inaccurate," but unspecified records of plaintiffs.

POINT I

THE AMENDED COMPLAINT FAILED TO CONTAIN ANY STATEMENTS SUFFICIENT TO SHOW THAT PLAINTIFFS ARE ENTITLED TO RELIEF.

As was the norm in this action, the District Court had to consider an amended complaint that stated in the vaguest of terms that plaintiffs had been deprived of their constitutional rights. Without any factual specificity the plaintiffs charged they were denied due

process. This vague pleading was submitted despite the fact that plaintiffs had taken three depositions and received copies of their examinations. The Court and the defendants were entitled to more. It was not error to dismiss the complaint which the plaintiffs in no way elaborated on despite the opportunity.

Even the liberal pleadings of the Federal Rules of Civil Procedure require that a complaint contain " . . . a statement of the claim showing that the pleader is entitled to relief." As this Court in a clear statement has recently stated as to Civil Rights actions, "It should not be enough . . . in § 1983 suits . . . to make only general charges with no specifications as might be sufficient under Rule 8 of the Federal Rules of Civil Procedure." Martin v. Merola, 532 F. 2d 191, 198 (2d Cir. 1976); accord Fine v. City of New York, 529 F. 2d 70, 73 (2d Cir. 1975); Powell v. Jarvis, 460 F. 2d 551, 553 (2d Cir. 1972).

While it is true, as this Court in Holmes v. New York City Housing Authority, 398 F. 2d 262, 265 (2d Cir. 1968), stated:

> "The mere fact that some of the allegations in the complaint are

lacking in details is not a proper ground for dismissal of the action."

However, in the case at hand, the plaintiffs had set forth no details. The amended complaint utterly failed to meet the minimal requirements of Martin v. Merola, supra, and the other cases cited.*

There was no excuse, at the time of the amended complaint, for the defendants to have to answer vague and conclusory allegations. They were entitled to sufficient specificity so as to make an intelligent response. Paragraphs "13" through "15" of the amended complaint failed to contain the requisite specificity to entitle plaintiffs to relief or require defendants to answer.

POINT II

THE AMENDED COMPLAINT FAILED TO SHOW THAT PLAINTIFFS WERE DENIED SUBSTANTIVE OR PROCEDURAL DUE PROCESS.

Despite the utter inadequacy of the complaint, supra, Point I, even in its vague outlines the complaint was properly dismissed because it failed to be within the subject matter jurisdiction of federal court or state a

* It should be noted that plaintiffs-appellants have been represented by counsel at all times in this action and appeal.

cause of action.

The two-pronged due process claim of plaintiffs had scant support in law and was legally fallacious. Plaintiffs had to assume they have some property right to remain in medical school. The complaint failed to allege such a right and we submit that none exists.

The concept of "substantive" due process is rather vague in itself. As described in Jeffries v. Turkey Run Consolidated School District, 492 F. 2d 1, 3 (7th Cir. 1974) in an opinion by then Circuit Judge Stevens:

> "The claim that a person is entitled to 'substantive due process' means, as we understand the concept, that state action which deprives him of life, liberty or property must have a rational basis - that is to say, the reason for the deprivation may not be so inadequate, that the judiciary will characterize it as arbitrary."

However, Judge Stevens goes on to criticize the concept as it is a standard that varies from time to time and from judge to judge.

Thus in order to make out a violation of

substantive due process rights, plaintiffs must have shown that the cancellation of their registrations impaired their liberty or property interests. To further quote Judge Stevens:

> "The Fourteenth Amendment prevents the state from depriving any person of liberty or property without due process of law. As [Board of Regents v.] Roth squarely holds, the right to procedural due process is applicable only to state action which impairs a person's interest in either liberty or property. Certainly the constitutional right to "substantive" due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument."

Jeffries v. Turkey Run Consolidated Sch. Dist., supra, (footnote omitted). Accord, Buhr v. Buffalo Public School District No. 38, 509 F. 2d 1196, 1202 (8th Cir. 1974). In short, if there is no right to procedural due process there is no right to substantive due process.

"Substantive" due process is such a nebulous concept as not to have a proper place in our jurisprudence. Stebbins v. Weaver, 396 F. Supp. 104, 116 (E.D. Wisc. 1975).

Plaintiffs would have the federal court substitute its standard for "academic failure" for those of the medical school. For this it is peculiarly unsuited. Connelly v. University of Vermont, 244 F. Supp. 156 (D. Vt. 1965).

POINT III

PLAINTIFFS' DISMISSAL SOLELY FOR ACADEMIC REASONS DID NOT REQUIRE ANY PROCEDURAL DUE PROCESS. OR IF IT DID, SUFFICIENT DUE PROCESS WAS PROVIDED.

We know of no authority in this Circuit which holds that any procedural due process attends one's dismissal from a graduate professional school for academic failure or insufficiency.

Whether plaintiffs failed to maintain a proper standard of scholarship is not a matter for the courts. Connelly v. University of Vermont, supra, 244 F. Supp. at 159. Plaintiffs' vague statement of ". . . bad faith and in an arbitrary and capricious manner." (Compl., ¶ "16") cannot support a cause of action. It in no way specifies the "bad faith" as in Connelly, supra at 159. Furthermore, defendants did not supply academic records to the Promotions Committee (Compl., ¶ "15").

Any reliance on Greenhill v. Bailey, 519 F. 2d 5 (8th Cir. 1975)* does not avail plaintiffs.

First, the opinion therein is specifically predicated on a notice by the medical school of lack of "intellectual ability" and such notice was available to all accredited medical schools. This was held to impose a "stigma" on appellant. However there was no such allegation in the amended complaint in the instant action. Thus the rationale of the Greenhill decision does not apply to Downstate. No stigma attended plaintiffs' cancellation of registration, and none is alleged.

Second, the record is clear from the prior complaint, the Memorandum of November 5, 1975, pp. 2-3, and the affidavit of A. Seth Greenwald, April 19, 1976, pp. 4-5 that plaintiffs were accorded all the procedural relief given appellant in Greenhill, supra at 9. Plaintiffs herein were notified several times of their academic deficiencies, given an opportunity to remedy them by make-up examinations and presentation of appeals in person with the responsible administration. Presence of attorneys is not required, only an "informal give-and-take."

* It is interesting to note that the same Circuit Judge authored this opinion as Buhr v. Buffalo Public School District No. 38, supra, 509 F. 2d 1196.

Greenhill, supra at 9. Plaintiffs had this on previous occasions. Even by Greenhill v. Bailey, supra, which is not binding on this Court, plaintiffs had no cause of action as to procedural due process.

The strong weight of authority, in contrast to Greenhill, is that dismissal for academic reasons does not invoke any due process requirements or they are rudimentary. Connelly v. University of Vermont, supra, 244 F. Supp. 156, 161.* The question whether appellants should have received a passing grade or what is sufficient progress to continue in medical school are not subjects for judicial review.

Accord, Gaspar v. Bruton, 513 F. 2d 843, 851 (10th Cir. 1975). To quote:

> "We hold that school authorities, in order to satisfy Due Process prior to termination or suspension of a student for deficiencies in meeting minimum academic performance, need only advise that student with respect to such deficiencies in any form. All that is required is that the student be made aware prior to termination of his failure or impending failure to meet those standards." (emphasis supplied)

* While "bad faith" may invoke judicial protection, Connelly involved a claim that the student was failed by an instructor who had made up his mind to fail plaintiff before he completed the course. The instant case has no such allegation or anything similar.

There can be no doubt plaintiffs were repeatedly advised that their academic performance was sub-standard and failure to pass certain courses would result in termination.

See also Mahavongsanan v. Hall, 529 F. 2d 448 (5th Cir. 1976); Depperman v. University of Kentucky, 371 F. Supp. 73 (E.D. Ky. 1974); Stevenson v. Board of Regents, 393 F. Supp. 812, 817 (W.D. Tex. 1975); Jolivet v. Elkins, 386 F. Supp. 261, 271, fn. 10 (D. Md. 1974); Williams v. Howard University, 528 F. 2d 658 (D.C. Cir. 1976).

Given the fact that plaintiffs failed to allege any facts showing some intentional and purposeful deprivation of constitutional rights, the complaint failed to state a cause of action or be within the subject matter jurisdiction of the federal courts. Powell v. Workmen's Compensation Board, 327 F. 2d 131, 137 (2d Cir. 1964).

CONCLUSION

THE ORDER BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
November 1, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CONSTANCE TREZZA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 31st day of November , 1976 , she served the annexed upon the following named person :

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Attorneys in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address within the State designated by them for that purpose.

Constance Trezza

Sworn to before me this
31st day of November , 1976

A. Seth Greenwald
Assistant Attorney General
of the State of New York